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Supreme Court of the United States

OCTOBER TERM, 1943

VIRGINIA HARRIS COHEN,

Petitioner,

v.

LEWIS RANDALL, as Executor of the Estate of Nathan D. Cohen, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. STEEFEL,
Attorney for Respondent.

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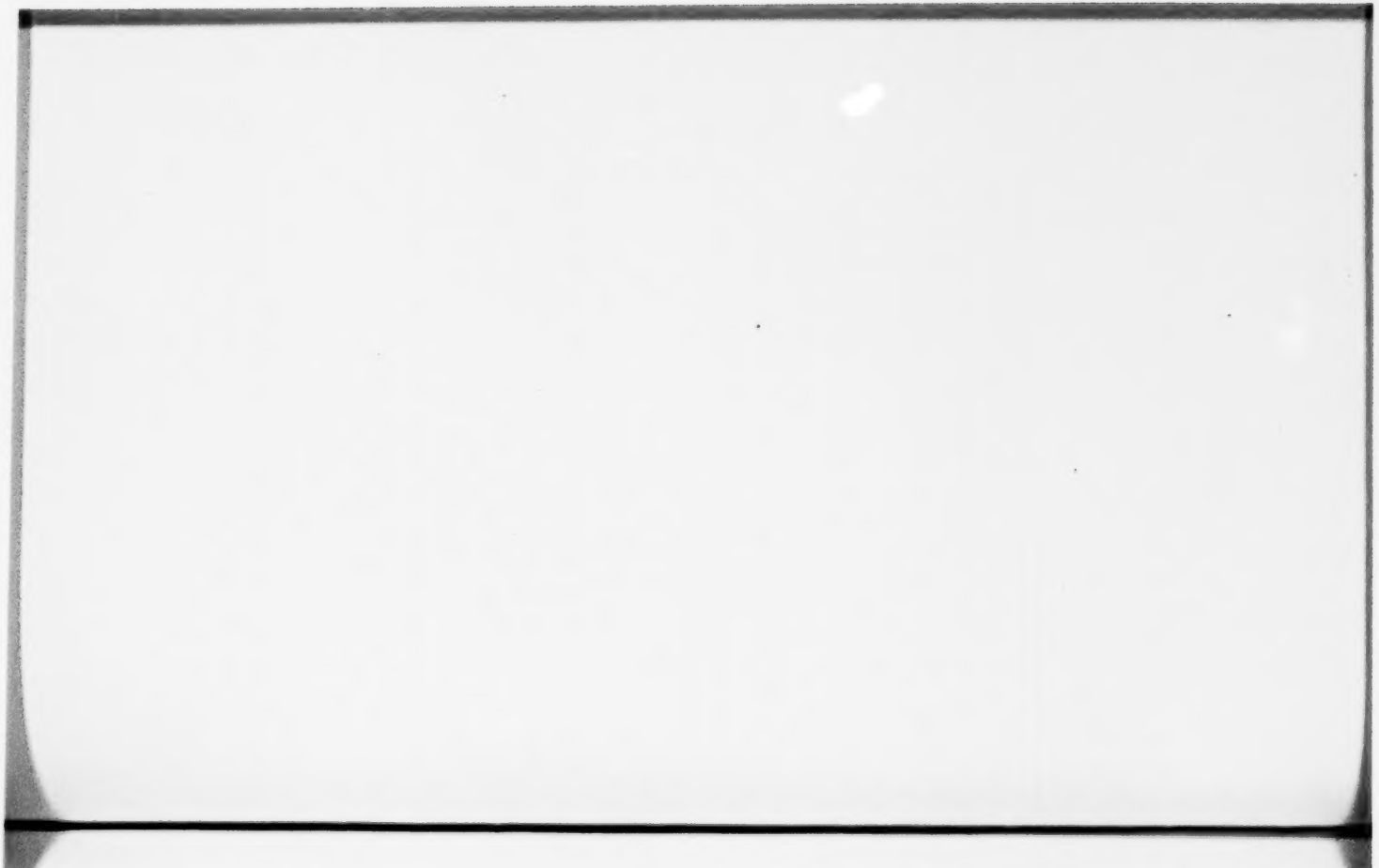

In the

Supreme Court of the United States

October Term, 1943

Virginia Harris Cohen,

Petitioner,

v.

Lewis Randall, as Executor of the Estate of the Nathan D. Cohen, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is an action by petitioner against the Executor of her husband's estate to recover damages for alleged fraudulent representations made by her deceased husband which she claims induced her to enter into a separation agreement with him and obtain a Nevada divorce from him during his lifetime, by reason of which she lost her right under Section 18 of the Decedent's Estate Law of the State of New York, to share in his estate upon his death.

Respondent, before answer, moved to dismiss the complaint on the ground that on its face it fails to state a claim against respondent upon which relief can be granted. This motion was heard by Hon. Edward A. Conger, Judge of the United States District Court for the Southern

District of New York, and the motion was granted; an opinion, which has not been reported, was written. Petitioner appealed to the United States Circuit Court of Appeals, Second Circuit, which Court affirmed the judgment and order below dismissing the complaint. The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 137 F. (2d) 441. From that decision of the Circuit Court of Appeals, a writ of certiorari is now prayed for by petitioner.

The Facts

The facts are clearly and adequately summarized in the opinion of the Circuit Court of Appeals and we will therefore not restate them in this brief.

POINT I

The decisions of the United States District Court and of the Circuit Court of Appeals, dismissing the complaint, were correct.

This case was prosecuted in the Federal courts only because of diversity of citizenship. The questions of law involved are but questions of local New York law, New York being the state where concededly the decedent resided and the cause of action, if any, arose. It has been the duty of the courts below to interpret the New York law applicable to the facts. We submit that their interpretation has been correct.

The complaint attempts to set forth a cause of action at law for damages for fraud and deceit. The damage alleged is that the fraudulent representations deprived petitioner of her statutory right (Decedent's Estate Law of the State of New York, Section 18) to her widow's one-third share of his estate. The substantial point relied upon below by the respondent is that by reason of a

divorce decree procured by petitioner herself from the defendant in the State of Nevada, she ceased to be his wife and she no longer had any rights, under the Decedent's Estate Law above referred to, to share in his estate.

But the petitioner asserts that the Nevada decree should be disregarded because the Nevada court had no jurisdiction to enter the decree. The petitioner appeared in Nevada and gave testimony in the court that she was a Nevada resident. Her husband appeared and did not contest the allegations of her claim. She now asserts that the testimony given by her in the Nevada divorce proceeding was false and perjurious and that she was not a bona fide resident of Nevada.

The law in New York is settled that in an action involving a private claim or demand for property or money damages, as distinguished from an action determining or affecting the marital status, a party is estopped from challenging the validity of a divorce decree obtained by her.

Querze v. *Querze,* 290 N. Y. 13;
Starbuck v. *Starbuck,* 173 N. Y. 503;
Brown v. *Brown,* 242 App. Div. 33, aff'd. 266 N. Y. 532;
Confer v. *District Court,* 49 Nev. 18.

Petitioner's second contention is that the Circuit Court of Appeals erred in refusing to grant her leave to amend her complaint (upon an application made by her for reargument following the affirmance by the Circuit Court of Appeals of the decision below) so that she might plead a cause of action in equity to set aside the Nevada divorce decree on the ground of fraud and, in addition thereto, on the ground of coercion, and as incidental relief to obtain her damages.

In her petition for reargument petitioner set forth certain alleged acts of coercion; she likewise had claimed coercion in her complaint (see paragraphs "Seventeenth" and "Eighteenth" of the complaint). Leave to amend was unnecessary because the courts below fully examined petitioner's claim from all of its aspects, including her claim of coercion as well as her claim of fraud, and found that the facts of which she complains did not entitle her to relief, either at law for money damages or in equity setting aside the divorce decree and awarding incidental damages. The courts below found that, assuming the truth of all of the facts alleged by petitioner, no coercion in law existed.

There is an answer to petitioner's request for leave to plead anew an equitable claim based upon coercion which is even more decisive—she is barred by her own laches. The acts of coercion of which petitioner complains took place in the year 1935. Thereafter and in the same year she procured the Nevada divorce. Likewise in that same year she obtained the money from her former husband which she now claims is insufficient. All of the facts upon which she now seeks to predicate her amended complaint took place and were fully known to her in the year 1935. If she had a claim, it was her duty to assert it within a reasonable time and prior to the death of her husband. He died on June 2, 1940. This action was commenced in December, 1941. She now seeks to establish this claim against his estate, which is at a grave disadvantage in contesting factual issues within the knowledge of the decedent but of which the Executor has no personal knowledge.

Indeed, during the lifetime of her former husband, petitioner, according to the facts alleged in her petition for rehearing (although not set forth in the complaint), did institute such an action in the courts of the State of California. Why did she not proceed with that action? She asserts that she abandoned the case because her husband

committed suicide. If she had a claim, her husband's death was no reason for the discontinuance of the action. Certain it is that that action instituted during the lifetime of the husband and within a reasonable time after the occurrence of the facts could be subject to no greater disabilities than an action instituted many years later after the death of her husband. It was upon this ground of laches that the Circuit Court of Appeals decided against her, the Court stating:

> "* * * In *Re Brigham,* 176 Mass. 223, 57 N. E. 328, Holmes, C. J., stressed that there must be a showing of real duress, and an absence of laches in seeking relief, particularly after the husband's death.
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> * * * * * * * * *
>
> "* * * a seven years' delay in acting against people she had already suspected appears not to be that absence of laches looked for by Holmes, C. J., in *Re Brigham, supra.* Of course, decision, on the facts, rather than on the pleadings, is ordinarily a safer course on issues of this kind; but there is no reason to suppose that plaintiff has not stated her strongest case (she sought no privilege of amendment below) or to think that plaintiff can prove a case within the authorities cited."

POINT II

None of the questions involved in the case at bar requires determination by this Court.

A. There is no conflict between the Circuits

It is not claimed by petitioner that the decision of the Circuit Court of Appeals, Second Circuit, in the case at bar is in conflict with the decision of any other Circuit Court on the same or similar questions.

B. No constitutional question is involved

The questions of law in this case involve, as the Circuit Court of Appeals expressly stated, solely an inter-

pretation of the local law of the State of New York. Although the divorce decree of a sister State is involved, neither the parties nor the courts below have invoked the full faith and credit clause of the Constitution of the United States; the divorce decree has been of importance only in that under its local law, the State of New York will not permit collateral attack on a judgment duly entered (whether that judgment be entered within the State of New York or within some other State).

Williams and Hendrix v. *North Carolina,* 63 S. Ct. 207, 87 L. Ed. 189, has been referred to by petitioner. This case has no relevancy to any of the questions involved in the case at bar. In the Williams case this court held that the courts of one State must give full faith and credit to a divorce decree duly obtained in another State. In the case at bar, the courts below have held that a party who has obtained a divorce decree is estopped from collaterally attacking that divorce decree and is barred even from a direct attack where she is guilty of laches.

C. The public interest is not involved

The public is not concerned whether this petitioner is able to collect some money from the estate of her deceased husband. Nor is the public concerned whether on the facts of this particular case she is estopped from now asserting that she perjured herself when she testified in Nevada that she was a bona fide resident of Nevada and by force of such testimony obtained a divorce; nor is the public interested in whether under the particular facts of this case, her long delay in asserting coercion, her discontinuance of an action instituted by her in California and the intervening death of her husband constitute such laches as to justify a court of equity in refusing to give her relief.

POINT III

The application for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT D. STEEFEL,
Attorney for Respondent.